

17 January 1978

OGC Has Reviewed

MEMORANDUM FOR: Acting Deputy Director of Central Intelligence
Deputy Director for Administration
Deputy Director for Science and Technology
Deputy Director for Operations
Director, National Foreign Assessment Center
Office of Legislative Counsel
Office of General Counsel
Office of the Inspector General
Office of the Comptroller

STATINTL

FROM:

[REDACTED]
Associate Director-Management
National Foreign Assessment Center

SUBJECT: Charter Legislation - Titles II and VI

STATINTL

1. Attached are copies of the latest SSCI drafts of Titles II and VI of the charter legislation. Title II is "Intelligence Activities and Individual Rights" and Title VI is a proposed FBI charter. [REDACTED] has talked with John Elliff and Elliot Maxwell, of the SSCI staff; they indicate it is their intention to sit down with Senators Huddleston and Bayh Thursday and Friday of this week to bring the Senators up to date on where things stand with regard to the drafting process. We anticipate receiving Elliot Maxwell's redraft of Title I sometime tomorrow.

STATINTL

2. In view of the fact that we did not receive these drafts yesterday as we anticipated, it obviously would not be feasible to attempt to pull together definitive comments on the material by tomorrow. Based on Bob [REDACTED] discussions with John Elliff, we should treat Title II in the following manner:

STATINTL

--submit to [REDACTED] by opening of business Thursday your major concerns for presentation informally to Mr. Elliff by COB Thursday, 19 January, or early Friday; and

--plan on having a session with Mr. Elliff along the lines of those held last week with the congressional staffers on Titles I and IV the latter part of next week. This would mean that we will then meet either Monday or Tuesday of next week to prepare our detailed comments on Title II.

3. With regard to Title VI, we should review this in conjunction with Title II; Mr. Elliff has requested that we devote particular attention to sections 608 and 609 relating to FBI coordination activities and requirements. We should essentially follow the same schedule on Title VI as noted above for Title II.

4. We will determine what course of action is appropriate and feasible for Title I after talks with Elliot Maxwell tomorrow to make arrangements for obtaining the new draft of that title.

5. All of our "in-house" deliberations and our discussions with the congressional staff personnel serve two purposes:

- presentation of informal Agency comments to the Committee; and
- laying the groundwork for development of formal DCI, and later Administration, positions.

Therefore, we should keep in mind throughout that we will be developing formal positions on matters contained in all of the SSCI draft titles. The IC Staff will provide copies of each of the titles as we receive them to other NFIB members. We should plan on meeting late next week to begin formalizing our views on each of the titles we have received.

STATINTL

Attachments



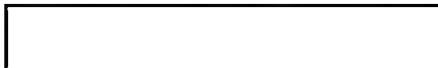
OGC 80-00542

21 January 1980

MEMORANDUM FOR: Director of Logistics

STATINTL

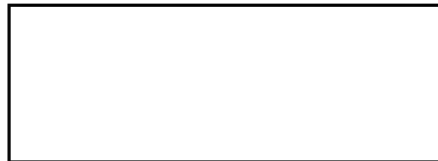
FROM:



SUBJECT: Analysis of Title II SSCI Draft of
6 November 1979

The Logistics and Procurement Law Division of OGC has reviewed the subject SSCI draft. Although this draft raises several questions of a general nature, we cannot see anything in it that impacts on the Office of Logistics specifically. You may, however, be interested in paragraph 13, which deals with non-intelligence activities. It may deserve closer scrutiny since its anticipated effects are not clear.

STATINTL



Att.
SSCI Draft

3. 0 0332

14 December 1979

MEMORANDUM FOR:

D/DCI/RM

Attn:

D/DCI/CT

C/PCS/PC

Attn:

AI/DDA

Attn:

AD/NFAC

Attn:

SA/DDS&T

Attn:

Comptroller

Attn: Maurice Lipton

Inspector General

Attn:

A/DCI/PA

Attn:

OLC

Attn:

STATINTL

STATINTL

FROM:

Special Assistant to the General Counsel

STATINTL

SUBJECT:

Analysis of Title II SSCI Draft
of 6 November 1979

Attached for your information and review is a preliminary analysis of the SSCI's latest draft of Title II of intelligence charters. Within the next month, the Intelligence Charters Working Group will draft an issues paper on Titles I - III for SCC consideration. I will keep you advised of our progress.

STATINTL

Attachment:
As stated

Analysis - SSCI Title II Draft of
6 November 1979

The sections referenced are those of the SSCI draft and are discussed in comparison to Administration counterpart provisions. Sections not discussed are identical to those in the Administration draft or contain minor editorial changes not deemed worthy of mention.

1. Section 202(b)(2) - The term "covert technique" is not defined in the Administration draft. The term is a central one in the SSCI's scheme for regulation of unconsented collection of information about U.S. persons. For example, foreign intelligence collection (FI) directed against U.S. persons by "covert techniques" would require a finding by the President under Section 205 that the desired information is FI "essential to the national security." Sections 207 and 208 provide that "covert techniques" may not be used for collection concerning potential sources or for security purposes. The SSCI apparently intends, or at least recognizes, that the term will provide some flexibility for collection activities. Whether a technique is a "covert technique" will depend on the purpose of the collection and other circumstances surrounding the need for the information. While perhaps difficult to justify conceptually, this could mean, for example, that recruitment of agents for directed collection might be a covert technique for FI collection under Section 205, while at the same time only a clandestine means for collection of information for security purposes under Section 208.

2. Section 202(b) - The SSCI has deleted the definitions of "essential foreign intelligence" and "important foreign intelligence" in the Administration draft. These deletions appear unobjectionable.

3. Section 202(b)(6) - The definition of "foreign electronic surveillance" has been modified to more closely parallel the FISA description of activities that constitute electronic surveillance. In addition, the SSCI definition substitutes the phrase "court order would be required under the Foreign Intelligence Search and Surveillance Act" for "warrant would be required if undertaken for law-enforcement purposes in the United States." (The same modification has also been made in the definition of "foreign physical search.")

This change places foreign electronic surveillance under the FISA standard instead of a strictly law-enforcement warrant standard, and thus broadens somewhat the surveillance activities within the definition so as to include the use of pen registers. See the FISA definition of "electronic surveillance" in FISA Section 101(f)(2).

4. Section 202(b)(7) - "Foreign physical search." For consistency the language has been changed to conform to the definition of "foreign electronic surveillance."

5. Section 202(b)(8)(C) - The words "openly acknowledged" have been deleted so that entities merely known to be directed and controlled by a foreign government are within the definition of "foreign power." This change is desirable.

6. Section 202(b)(10) - The SSCI's language specifies that minimization procedures pertain to extraordinary techniques and in Section 202(b)(10)(B) the words "foreign intelligence" have been substituted for "information" in the Administration draft and the word "foreign" has been inserted before "intelligence" in the latter part of the subparagraph. These changes and changes in Section 204 seem designed to require that only foreign intelligence, and not counterintelligence (CI) and counterterrorism intelligence (CTI) shall be subject to formal minimization procedures adopted by the Attorney General.

a. The new definition provides that the procedures "shall be adopted by the Attorney General" in consultation with entity heads and the DNI rather than, as in the Administration draft providing that the procedures shall be promulgated by entity heads in consultation with the DNI and approved by the Attorney General. This change is probably unobjectionable.

b. The words "for law-enforcement purposes" at the end of the definition have been substituted for "for the purpose of preventing a crime or enforcing the criminal law." While the SSCI recognizes that information should be disseminated for both purposes and would make this clear in legislative history there seems to be no good reason not to insist on the Administration language.

7. Section 203(a) - This provision is Administration section 211(a) modified. It provides a general statement of authority to collect, retain and disseminate intelligence

concerning U.S. persons and to collect, retain and disseminate information concerning U.S. persons who are potential sources, or for security purposes. The SSCI staff advises that section 203(a)(2) is intended to provide for CI, CTI, and special activities directed against U.S. persons.

8. Section 203(b) - A counterpart of Administration section 220(a)(6) and (7).

9. Section 203(c) - Administration Section 211(b) modified.

10. Section 203(d) - Administration Section 211(c) reworded.

11. Section 203(e) - Administration Section 211(e) reworded.

12. Section 203(f) - This subsection is Administration Section 226. Subsection 203(f)(2) has been modified to require notification to the Attorney General when illegally collected information evidencing danger to the safety of a person is disseminated. In addition, the words "is required by law" in section 203(f)(3) have been substituted for "is relevant" in the Administration draft. These changes seem unobjectionable.

13. Section 203 - The SSCI has deleted Administration subsection 211(f), which provides that "Nothing in this Title shall prohibit, limit, or otherwise affect the functions of any department or agency that are not intelligence activities, other than activities undertaken...to provide personnel, document, communication or physical security." It is unclear whether this deletion is objectionable.

14. Section 204(a) - This subsection consolidates in one place the separate requirements for Attorney General-approved procedures in Administration sections 213, 215, 220-223. Subsections 204(a)(1) - (8) contain standards for the required procedures, some of which are patterned after standards in Administration provisions which are applicable to only a particular collection activity. The requirement that the standards apply to the procedures for all types of collection does not seem objectionable.

a. Section 204(a)(1) - See Administration section 220(b)(6)

b. Section 204(a)(2) - See Administration section 220(b)(4).

c. Section 204(a)(3) - See Administration section 217, which requires information obtained through electronic surveillance to be treated in accordance with minimization procedures. This SSCI provision appears to require some minimization under Section 204 procedures for CI and CTI.

d. Section 204(a)(4) - This provision requires minimization under Section 204 procedures with respect to the dissemination of all foreign intelligence concerning U.S. persons, and not just that obtained by extraordinary techniques or the placing of agents in U.S. organizations covered in the Administration draft.

e. Section 204(a)(5) - See Administration section 220(a)(3).

f. Section 204(a)(6) - See Administration section 211(d).

g. Section 204(a)(7) - This provision calls for regulation of the use of covert techniques designated by the President under section 202(b)(2).

h. Section 204(a)(8) - According to the SSCI staff, this provision is intended to provide for the regulation of approved participation in illegal activities and the use of cover in the United States or directed against U.S. persons abroad. The closest Administration counterpart is in Administration section 215(g) which provides that nothing in section 215 (placing of agents to collect FI) is intended to restrict covert participation by intelligence employees in organizations in order to establish, enhance, or maintain covert, or for the purpose of recruiting potential sources.

15. Section 204(b) - The requirement to provide procedures to the Select Committees may be found in Administration section 213, but the Administration provision has no requirement to do so in a "reasonable time prior to their effective date." This addition should be unobjectionable.

16. Section 205 - This section covers in general the collection of foreign intelligence directed against U.S.

persons. Collection by extraordinary techniques outside the U.S. is covered by Section 209, although such collection must be authorized in accordance with Section 205. Collection by other techniques will be regulated under Section 205 if the techniques involved are designated "covert techniques" by the President. Techniques not designated would nevertheless likely be "clandestine means" and thus further regulated under Section 205(d) and Section 208(b). (The term "clandestine means", while undefined, apparently includes any technique that is not an extraordinary technique or a covert technique.) Administration sections 215 and 216, covering collection through placement of agents and "other" techniques (mail covers, physical surveillance, directed collection) are thus not specifically incorporated in the SSCI draft.

a. Subsection 205(b)(2) requires NSC or committee review composed of at least the Secretaries of Defense and State, Attorney General and DNI.

b. Section 205(b)(3) requires the President to reaffirm under 205(b)(1) any collection which lasts beyond one year or which is substantially changed in technique or purpose.

c. Subsection 205(c)(1) authorizes foreign intelligence collection by covert techniques to be directed against a U.S. person that is (1) a corporation that is directed and controlled by a foreign power, or (2) a senior official of a foreign government, based upon a finding by an official designated by the President that the collection is for foreign intelligence necessary to the national security. The Working Group had proposed to allow collection of foreign intelligence "important" to the national security to be directed against "U.S. person" corporations and unincorporated associations that are directed and controlled by a foreign power.

d. Section 205(c)(2) - The requirement in this provision for notification to the Attorney General for collection under section 205(c)(1), and for periodic review of such collection by the NSC or a committee was not in the Working Group's proposal. These requirements may be unobjectionable.

e. Section 205(d)(1) - Under this provision, except for electronic surveillance under the FISA, only the FBI (with notice to the Attorney General), the

military services with respect to persons under the UCMJ, or CIA "through established sources" (the Working Group had proposed "through pretext interviews"), would be authorized to collect foreign intelligence under 205(c)(1) within the United States by clandestine means directed against U.S. persons. The SSCI did not adopt a proposal by the Working Group that NSA be permitted to engage in such collection "directed at foreign communications" as defined in Title VI. (One problem with authorizing such collection by NSA is that it might make it unclear whether NSA would be thus authorized to engage in activities covered by the FISA without regard to FISA.)

f. Section 205(d)(2) - This is a new requirement for annual review by entity heads and a report to the Attorney General or his designee for collection by clandestine means lasting longer than one year, or to the service secretaries for such collection by the military components. It probably is not objectionable.

17. Section 206 - This section concerns CI and CTI collection directed against U.S. persons and thus combines Administration sections 218, 220 and 221.

a. The standard for CI and CTI collection in Administration section 218(a) has been expanded somewhat to clearly encompass persons "reasonably" believed to be engaged in both clandestine intelligence gathering activities and "other clandestine activities" on behalf of a foreign power. This change appears unobjectionable.

b. Section 206(b) - Administration 220(b) modified.

c. Subsection 206(c) - This is Administration section 221 modified to add collection by "access to the records of a financial institution" to the techniques that are covered. Currently, entities of the Intelligence Community with CI and FI responsibilities may obtain access to financial records only upon compliance with Section 1114 of the "Right to Financial Privacy Act of 1978."

d. Subsection 206(d) - This provision was added in the September SSCI draft and requires notification to the Attorney General for CI or CTI collection through

placement of agents and by the techniques specified in section 206(c) if such collection is based on section 206(a)(2) (engaging in "any other clandestine intelligence activities on behalf of a foreign power"). The notice requirement is the SSCI's trade-off for dropping the criminal standard in their July, 1979 draft, and has been added because the activities at which collection could be directed under 206(a)(2) could involve constitutionally protected speech or association or other legitimate activities.

e. Section 206(e) - The requirement for annual review of collection activities under section 206 is also found in the Administration draft, but only for collection through "other techniques." See Administration section 221. The SSCI modification seems unobjectionable.

18. Section 207 - The SSCI provision expands the scope of potential source collection by allowing such collection to be directed at any U.S. person without regard to whether such person is the potential source. It also adds a six-month limitation for such collection, with a provision for renewal for six months. The SSCI version limits such collection to "interviews, physical surveillance for purposes of identification, and checks on law-enforcement and intelligence records, unless other techniques are approved by an entity head with notice to the Attorney General. These changes seem unobjectionable.

19. Section 208 - subsection 208(a)(2) contains a limitation on collection for security purposes or to protect against breaches of contractual obligations to that necessary to refer the matter to DoJ. A similar requirement has been added in 208(a)(3) with respect to collection to protect against direct or imminent threats, limiting such collection to that necessary to refer the matter to an appropriate law-enforcement agency.

a. Subsection 208(b) prohibits the use of covert techniques and mail covers for collection for security purposes. The Administration draft prohibited only the use of extraordinary techniques. In light of the open-ended nature of the term covert technique this change may be of little significance.

b. Subsection 208(b) also provides that "clandestine means" may be used for this type of collection only upon a written finding by an official designated in

section 204 procedures that the means of collection is necessary "for authorized security purposes" and meets the requirements of section 204 procedures. This requirement does not seem objectionable.

20. Section 209 - This section concerns the use of extraordinary techniques against U.S. persons outside the United States and combines and rewords Administration provisions in sections 214 and 219.

a. Subsection 209(b) is Administration subsection 214(b) and 219(b) combined and reworded. The words "outside the United States" have been added for clarity and emphasis.

b. Subsection 209(c) - This provision concerns what the court must find before granting an order authorizing the use of an extraordinary technique to collect foreign intelligence. The provision adds a requirement that the Attorney General certify in writing that the proposed use of the extraordinary technique has been approved in accordance with section 205. The Administration counterpart provision calls for a certification by a senior official designated by the President that the information sought is "essential foreign intelligence." The difference in the certifications is due to the different approval requirements in the Administration and SSCI drafts for collection of essential FI, but the reason for the change in the official that makes the certification is unclear. Perhaps the SSCI feels it would be better to have the Attorney General make all certifications to the court (see Section 210, Cooperative Arrangements), although the Attorney General does not make all the certifications required under the FISA.

c. Section 209(d) concerns the use of extraordinary techniques to collect CI or CTI. In subsection 209(d)(2) the words "engages or is about to engage in clandestine intelligence activities etc." have been substituted for "is or may be engaged in etc." in the Administration draft.

d. Subsection 209(g) applies sections 106 to 108 of FISA (Use of Information, Report of Electronic Surveillance, Congressional Oversight,) to the use of extraordinary techniques authorized by section 209.

e. Subsection 209(i) authorizes military judges designated by the Secretary of Defense to issue orders in conformance with the provisions of section 209, with notice to the Attorney General. Beginning with "the procedural, administrative, and security provisions etc.," this provision repeats the requirement of subsection 209(g) that the procedural, administrative and security provisions of FISA apply to applications considered by military judges. This repetition is unnecessary and could be deleted if the language "by the court considering" in section 209(g) were changed to "in the consideration of." Section 209(i) could then end with a provision allowing the Secretary of Defense to establish additional security measures.

21. Section 210(a) - Cooperative Relationships. The words "in connection with any proceeding under section 209" have been added to the language of Administration section 225 and make it clear that the exemption from disclosure applies only to proceedings for a court order under section 209. While section 210(a) is not as specifically worded as Administration section 225(a) in terms of the categories of information covered by the exemption, the SSCI agrees that all information and even the existence of relationships is covered.

Subsection 210(b) modifies Administration section 225(b), which authorized the Attorney General to certify that he had made the probable cause finding the court would otherwise make under section 209(c)(3) (that the U.S. person is in possession of the foreign intelligence sought) or section 209(d)(2) (that the U.S. person engages or is about to engage in clandestine intelligence activities on behalf of a foreign power). The Administration provision also authorized the Attorney General to certify that he had made the finding required by section 209(d)(1) (Administration subsection 219(c)(2)) (that "significant CI or CTI is likely to be obtained" from use of the extraordinary technique), but this has been deleted by the SSCI. Subsection 210(b) makes it clear that the Attorney General is authorized to certify "facts" rather than to find probable cause, and states that the court shall not refuse to make a finding of probable cause because information protected by section 210(a) has been withheld. These changes were suggested by the Working Group.

22. Section 211 - Emergency Procedures. This provision modifies Administration section 224, which authorizes the use of extraordinary techniques in emergency situations, to include foreign intelligence collection under section 205. This modification seems unobjectionable. In section 211(d) the word "applicable" should be inserted before "minimization procedures" for clarity since emergency collection of FI by a covert technique under section 205 would not be subject to the same minimization procedures as collection involving extraordinary techniques under section 209.

23. Section 212(b) - Criminal Sanctions. The SSCI provision has qualified the second defense to prosecution under section 212(a) by making it applicable to only law-enforcement officers engaged in the course of official duties. This modification was apparently made because, upon enactment of Title II, there will clearly be a statute and established judicial procedure governing the surveillances and searches of interest to the Intelligence Community. This will not be the case, however, with respect to searches and surveillances conducted abroad for Federal law-enforcement purposes.

24. Section 213 - Civil Liability and Jurisdiction. This provision is the same as Administration section 262 except that section 262(c), which provides that the remedy established by the section shall be the exclusive remedy for violations of provisions of the act authorizing foreign electronic surveillance or foreign physical search, has been deleted. It is unclear whether this deletion is objectionable.

Subsection 213(c) is Administration section 263(a) and (b) modified and combined. The SSCI provision deletes Administration language which makes it clear that no substantive or procedural rights are created by the procedures or guidelines established pursuant to Title II. The deletion of this Administration language is unacceptable.

25. Section 214 - This provision authorizing disciplinary action for violations of the act or guidelines, procedures, or regulations established pursuant to the Act is not in the Administration draft. The provision is objectionable.

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